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Former Jeopardy in Cases of Discharged Juries

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T H E S I S

F O R M E R J E O P A R D Y I N C A S E S

of

D I S C H A R G E D J U R I E S .

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Presented for the Degree

of

Bachelor of Laws

by

Addison Berton Reed, A. B.

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Cornell University

1895.

FORMER JOEPARDY IN CASES OF DISCHARGED JURIES.

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The word jeopardy signifies danger or peril; and in law the term is applied to the situation of a prisoner where a jury is sworn and empanelled to try his case, and charged with his deliverance upon a valid indictment. (Am. and Eng. Ency. of Law, Vol. II., p. 926; 1 Bish. Crim. Law Sec. 1015; Cooley Const. Lim. 327; Kendall v. State, 55 Ala. 492; Teat v. State, 53 Miss. 453; State v. Redmond, 17 Ia. 329.)

The principle of jeopardy is found in one of the maxims of the civil law -- "Nom bis idem" --, and is embodied in the very elements of the common law also,-- "nemo debet bis vexari pro uno et eadem causa" and "Nemo debet bis puniri pro uno delicto"; and is therefore an ancient and well established principle which is a part of the universal law of reason, justice, and conscience. (AM. and Eng. Ency. of Law, Vol. II., p. 296, and note; 4 Black. Comm. 315.)

In the United States, this just and well settled principle was adopted in the Federal Constitution. Amendment V. of the Constitution provides, that "No person

shall be subject for the same offence to be put twice in jeopardy of life and limb." And nearly all of the states have followed with a similar provision in their separate constitutions. But it has been held that where such provisions have been omitted in the state constitutions, the guarantee in the United States Constitution does not apply, it being ^a restriction on the Federal Government alone. (*Comm. v. Whitney*, 108 Mass. 4; *Barron et al. v. City of Baltimore*, 7 Peters, 243; *Withers v. Buckley et al.*, 20 How. 84.) And in the recent Connecticut case of the *State v. Lee* { *Har. L. Rev.*
vol. 8, p. 354 }, it has even been held that in criminal cases, the state may secure a new trial on appeal, for error of law. In fact a statute of the state allows such an appeal in such cases. (See *Gen-Stat. Conn.*, Sec/ 1637. being 1886 Stat. 15).

In this paper the discussion of the plea of "former jeopardy" or "once in jeopardy" will be limited to cases of the discharge of a jury before verdict, by the court, either on account of (1) inability to agree, (2) illness or other disability of the juror, (3) expiration of term of court, (4) what the court in its discretion, may

deem, necessity, (5) withdrawal of jury for technical purposes.

Sergeant Hawkins, in his Pleas of the Crown, Vol. 2, Ch. 47, Sec. 1, says: "It seems to have been anciently an unconverted rule and hath been allowed even by those of the contrary opinion to have been the general tradition of the law, that a jury, sworn and charged in a capital case, cannot be discharged without the prisoner's consent, ~~ti~~ll they have given a verdict." Lord Coke was the authority for the rule laid down by Hawkins. In his first Inst. 227, he asserted the doctrine thus: "A jury sworn and charged in case of life and member, cannot be discharged by the court or any other, but they ought to give a verdict." In the third Inst. 110, he says: "To speak it here once for all, if one person be indicted for treason, or a felony, or of larceny, and plead not guilty, and therefore a jury is returned and sworn, their verdict must be heard, and they cannot be discharged."

Lord Hale admits that such was the rule "by the ancient law". He says: "By the ancient law, if the jury sworn had once been particularly charged with the prison-

er, as before shewed, it was commonly held they must give up the verdict, and they could not be discharged before their verdict was given up." "But," he goes on to say, "the contrary course has for a long time obtained at Newgate, and nothing is more ordinary than after the jury sworn, and charged with the prisoner, and evidence given; yet if it appears to the court that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offence notorious, as murder or burglary, and that the evidence, though not sufficient to convict the prisoner, yet give the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner, and remit him to the gaol for further evidence; and accordingly it hath been practised in most circuits of England, for otherwise many notorious murders and burglaries may pass unpunished by the acquittal of persons probably guilty, where the full evidence is not searched out or given. (2 Hales P. C., 294, 95.)

whether a court possess the power to discharge a jury who cannot agree on a verdict, and because they cannot agree, in a capital case, has long been a vexed question. It may be at least a satisfaction to examine the authori-

ties, British and American, both in support of and in opposition to the power. In England, perhaps the doctrine may be regarded as permanently established, that the power does exist in the discretion of the court. In the United States a different practice prevails. In some the power is entirely disclaimed; in others it is acknowledged in a qualified manner. In others again, it is recognized in all its latitude and strength.

We have seen that Lord Coke laid down the rule "once for all" in the third Inst., that after a jury is returned and sworn they cannot be discharged; that Hawkins adopts as "anciently and uncontrovertedly the rule". The doctrine was incorporated without qualification in the earlier editions of Blackstone's Commentaries. In the 4th Edition, published in 1770, appears the following sentence: "When the evidence on both sides is closed, the jury cannot be discharged until they have given their verdict, but are to consider it, and deliver in, with the same forms upon civil causes, only they cannot in the criminal case give a private verdict." In the subsequent edition published in 1803, the same sentence is changed so as to read: "When the evidence on both sides

is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict etc."

What should constitute the evident necessity which is to justify the discharge of the jury, must depend, of course, on the discretion of the court.

In a note to the case of *Chedwick v. Hughes*, (Carten, 464), it is reported, that "Holt, Chief Justice, at at the sitting in Westminster, 9th November, 1698, in the case of perjury tried before him, between the King and one Perkins, said, that it was the opinion of all the judges of England upon debate between them, (1) that in capital cases, a juror cannot be withdrawn, though all parties consent to it; (2) that in criminal cases, not capital, a juror may be withdrawn, if both parties consent, but not otherwise; (3) that in all civil cases a jury cannot be withdrawn but by the consent of both parties. The case of the King v. Perkins is reported to the same effect precisely in the report of cases determined in the time of Lord Holt, in *Holts Report*, 403.

And so we may say that such was the law of England until 1746, when the case of *King v. Kinlocks* arose.

Foster's Crown Law, 16 (Opinion of Foster, J., page 29)

In this case, the prisoners, Alexander and Charles Kinlock were brought to trial for high treason. One jury was sworn and charged with them. The junior counsel for the crown opened the indictment, and the Solicitor General proceeded to open the evidence. At this point, Chief Justice Willes, before any evidence is given, told the prisoner's counsel that he ~~was~~ informed they had some objection to make in behalf of their clients, founded on the Act of Union, which was proper to be spoke of before the counsel for the crown went into their evidence. The objection of the prisoner's counsel was in the nature of a plea to the jurisdiction of the court, which objection, the Chief Justice said, could not be made on the issue of not guilty, and he therefore proposed that a juror should be withdrawn; that the prisoners should have leave to withdraw their plea of not guilty, and to plead this matter specially; and that the Attorney General might demur and so the point would come regularly before the court. Therefore, on motion of the prisoner's counsel, and at their request, and with the assent of the attorney general, a juror was withdrawn and the jury discharged. It was urged that the objection might be

raised on the plea of not guilty, and that the trial might go on upon the issue joined but it was otherwise ordered.

The prisoners withdrew their former plea of not guilty, in order that they might be ready the next day with their pleas to the jurisdiction in form -- to which the Attorney General declared he would demur instante.

The next day the defendants were arraigned and tendered plea to the jurisdiction. The court over-ruled the plea and sustained the demurrer, and ordered the defendants to plead over to the treason. They pleaded not guilty, another jury was sworn and they were found guilty. They moved in arrest of judgment. The first jury had been sworn and charged with them on October 28, and the second on October 29. And the prisoner's counsel, therefore, insisted that the latter was a mistrial and the verdict a mere nullity. The Lord Chief Justice interrupted the argument and admitting the unsettled state of the law on the subject and the importance of the question, decided to postpone further consideration of it till the next adjournment, when he should obtain assistance of all the judges of the commission.

On the 15 December, 1746, the cause was argued before the two Chief Justices Welles and Lee, Mr. Justice Wright, and six other barons and justices. Mr. Jodrell argued in behalf of the defendants in arrest of judgment. He admitted that in the time of Charles II, the practice of the courts had been in favor of discharging juries, but that ever since the Revolution, a contrary practice had uniformly prevailed, and that even in the reign of James II., the judges in Lord Delamere's Case, (4 State Trials, 232, old folio) declared, that a jury sworn and charged in a capital case, cannot be discharged, but must give a verdict. As to the law preceding and following the revolution he referred to 1 and 3 Coke's Inst. and Carthen, 464, before cited. He then proceeded to show that the practice since that time in criminal cases, had been conformable to this rule, and cited the cases of The King v. Morgan (9 Geo. 2), and The King v. Jeff, (7 Geo. 2) The latter case is reported in Strang's Reports, p. 984. In both of which cases Lord Hardwicke, citing Chedwick v. Hughes, (Carthen, 464) refused to withdraw a juror at the prayer of the King's counsel, because the defendant's counsel refused consent to it.

As to the matter of consent, in this case, the counsel observed, that consent might generally be said to have the effect of curing an irregularity, but never can justify the breaking through any of the fundamental principles of law; especially such rules as are in favor of a prisoner answering for his life; for a prisoner so situated, may, perhaps, be overawed into a consent, manifestly to his prejudice; and this circumstance should, therefore, throw the matter of the consent quite out of the case.

To this the counsel for the Crown answered, denying any importance or authority to the resolutions in Carthen, and cited in support of the proposition that a juror might be withdrawn and a jury discharged the cases of Mansell, (1 Anderson's Rep. 103, 104) and Whitebread's Case (2 State Trials, 829) (old folio Vol.) And as to the rule laid down by Coke, they were cited in answer, 2 Hale's P. C., 295-6-7. above referred to, and to King v. Jane D- (1 Ventr. 69).

On December 20, the court delivered their opinion, and all except one agreed that judgment ought to pass against the prisoners. They admitted the rule laid down

by Coke to be a good general rule, but not universally binding, especially where it would be productive of great hardship or manifest injustice. In the present case, the prisoners were advised upon their trial to object to the jurisdiction of the court; but having pleaded to the issue, it was suggested that they were too late with their objection. And, therefore, in order to let them into the benefit of the objection, liberty was given them at their request, to withdraw their plea of not guilty before evidence given, and to plead to the jurisdiction. Consequently the prisoners had no right to complain of that which was necessarily a consequence of an indulgence shown them by the court. The judges paid very little attention to the resolution in Carthen and to Lord Delamere's Case, and joined in condemning the case of Whitebread (*supra*) as cruel and illegal and hoped it would be never drawn into example. In that case the defendant was indicted for high treason, and on December, 17 1678, he was brought to trial, a jury sworn and charged with the prisoner, and evidence brought in and examined and found sufficient. And so the jury was discharged without verdict; and on June 13, they were brought to

trial again on the same indictment and convicted.

In the opinion of Mr. Justice **Boster**, he began by saying, that the counsel on both sides had gone into the general question, touching the power of the court to discharge juries sworn and charged in capital cases, farther than he thought was necessary. The general question, he said, involved a point of great difficulty and mighty importance. But he chose to consider the present case singular as it stood on the record.

The question, therefore, was not, whether a jury might be discharged after evidence given, in order to the preferring of a new indictment better suited to the nature of the case. This was frequently done before the revolution, and in one or two instances since. Nor was it the present question, whether the court might discharge a jury where undue practices appear to have been used, such as was the unjustifiable proceeding in the case of Whitebread(supra).

He then proceeded to state what he took the question to be; and that was, whether, in a capital case, where the prisoner may make his full defence by counsel, the court may discharge the jury upon the motion of the

prisoner's counsel, and at his own request, and with the consent of the Attorney General before evidence given, in order to let the prisoner into a defence, when, in the opinion of the court, he could not otherwise have been let in. And he was clearly of opinion, that a jury might in such case be discharged, and the discharging of them under these circumstances would not operate to discharge the prisoner from any future trial for the same offence.

The learned justice observed that the rule laid down by Coke was in very general terms, and besides, was wven unfounded in reason and unwarranted by authority. He then stated the case of Rockford, 1696, (4 State Trials, 661, Old Folio Vol.), a case almost exactly similar to the one at bar in which Lord Holt and the other judges entertained that the prayer of the prisoner's counsel, and with the consent of the Attorney General, a jury sworn and charged in a case of high treason might be discharged, without barring another trial. In this case also, the court adopted the expedient, at the paryer of the prisoners and their counsel, and with the consent of the attorney General, - not to bring the prisoner's life twice in jeopardy, - but in order merely to give them one chance for their lives, which, it was thought, they had lost by

pleading to issue.

The discharge of the jury in this case was not a strain in favor of prerogative; it was not done to the prejudice of the prisoner; on the contrary, it was intended as a favor to them. In that light it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light the Attorney General consented to it. And in that light, the judge concluded, he knew of no objection to it in point of law or reason.

Mr. Justice Wright, dissenting, admitted that the discharging of the jury was an instance of great indulgence toward the prisoners. But he thought it safer to adhere to the rule of law which was clearly laid down by Lord Coke, than upon any account to establish a power in judges, which it was admitted had been grossly abused, and might be so again. He observed that the court did not deny, outright, the ancient law laid down by Coke, and repeated by Hawkins and Blackstone. On the contrary, they said:- "Admitting the rule laid down by Coke to be a good general rule, yet it cannot be universally binding!" He also noted that Mr. Justice Foster expressly

waived an opinion on the general question - owning it to be one "of great difficulty and mighty importance".

Justice Wright continues: If there were no foundation for the general rule laid down by Coke; if the "authorities" to which he refers in support of it, "does not in the least warrant it"; if the conclusion drawn by him therefrom was mistaken and false, it is very singular that the court would not at once disclaim the rule, and declare it not to be law. And it is no less singular, that, under such circumstances, Mr. Justice Foster should have considered "the general question", depending on the existence of a rule which had no existence, "to be a point of great difficulty and of mighty importance." What great difficulty there could be in the judge deciding against a rule, laid down by a text-writer, which had not the authority of an adjudicated case "to warrant it", is at least not at all clear.

It may then be said, that if the "general rule" had been exploded, the several laws, all depending upon it, as to which Mr. Justice Foster waived a decision, would

(1) Foster's Crown Law, p. 30.

no longer be open to discussion. But the decision rested as it was made, and left the law thus in England until 1812, when the question arose in the case of *The King v. Edwards* (4 Taunt. 309). The offence of the prisoner was capital. The facts upon which the question depended were, that after indictment, arraignment, the jury charged and evidence given, one of the jurymen fell down in a fit and could not proceed with his duties as a jurymen. Whereupon, Wood, B., discharged the jury, and directed a new jury to be sworn consisting of the same eleven persons who remained of the former jury, and another. The objection made by the counsel was that a jury once sworn and charged with a criminal case, could not be discharged without giving a verdict; and it was elaborately argued in the Exchequer Chamber before all the judges of England, except two. The court stopped the counsel for the prisoner, and said that the question had been decided in so many cases, that it was now the settled law of the land, and gave judgment against the prisoner. What the cases were the court did not say. There was a nisiprius case in 1794, *The King v. Scalbert* (2 Leach. C. R. C. 620), where the same decision was given upon

like facts as those of *The King v. Edwards*(supra).

In the

In the United States, the rule is not uniform in the several states where the question has arisen for judgment, the weight of authority, perhaps, being in favor of the exercise of the discretionary power of the court.

The cases in New York have held uniformly in favor of the exercise of the power. In the case of *The People v. Denton*, (2 Johns.275) the indictment was for a misdemeanor. On the trial, the jury retired, having heard the evidence, and after having been out all night, came into court with a verdict of not guilty; but, on being Poll ed , three of them dissented. They finally informed the court that there was no probability of their ever agreeing on a verdict, and without the consent of the defendant, they were discharged by the court. The indictment having been removed to the Supreme Court, it was there held that the power to discharge the jury existed, although to be exercised with caution, and only after a reasonable endeavor to obtain a verdict proved to be unavailing; that the discharge in this case was necessary and proper, and that he should be again tried by another

jury on the same indictment.

The case of the People v. Alcott (2 Johns. 301, 1800) was an indictment for a conspiracy to defraud the Bank of New York. The jury having remained out a long time, says the report, that is, from about eight o'clock in the evening until two o'clock the next day, at length agreed on the following verdict:- "That there was an agreement between Roe and the prisoner to obtain money from the Bank of New York, but with the intent to return it again." This verdict the court considered as imperfect, and refused to receive it. The court then asked the jury if there was any prospect of their agreeing on a general verdict of guilty or not guilty, and the foreman said, "No". To several of the questions asked by the court, as to whether they could agree upon a special verdict, the answers being in the negative, the court, without consent of the prisoner, discharged the jury. It was held by the Supreme Court, Kent J., delivering the opinion, that the inferior court did not exceed its powers, and that it must be a pretty clear case of an abuse of discretion to induce the court to say that the jury ought not to have been discharged.

The above case arose in 1800. The next case arose in 1804, *People v. Barrett and Wood* (2 Caines, 304). It was an indictment for a conspiracy. The jury was sworn, the defendants were arraigned, and pleaded not guilty. Immediately after this, the District Attorney served on Barrett a notice to produce a promissory note mentioned in the indictment or that parol testimony would be given of its contents. The trial proceeded, the note was called for, and on its not being produced, the District Attorney offered the parol evidence. Counsel for defendant objected, alleging the want of due notice, as the note was not in their possession, but at a house fourteen or fifteen miles distant. The court refused the parol testimony. Whereupon the District Attorney Moved for leave to withdraw a juror, without the consent of the defendants, and the jury was discharged. On a subsequent day they were again arraigned, tried and found guilty on the same indictment; and the question was, whether these circumstances were not sufficient to arrest the judgment. The opinion of the Supreme Court was, that the court below ought not to proceed to judgment on the conviction, but discharge the defendants, "Without denying the right of

the courts, " they said, "to withdraw a juror in criminal cases, and put the defendant on his trial a second time, it is evident that this power should not be lightly used, but confined, as much as may be, to cases of urgent necessity, where, by the act of God, or by some sudden or unforeseen accident, it is impossible to proceed without manifest injustice to the public or to the defendant himself". They also said that they did not mean to define all or any of the cases in which the practice might be pursued, but they all agreed that a defendant ought, in no case, to be put on a second trial for the same offence, where a juror had been discharged on 6666ther ground than because the public prosecutor found himself unable to proceed, for the want of sufficient testimony to convict, and where that inability was the consequence of his not having taken the necessary measures to obtain it. It would be much better, thought the court, that the guilty now and then escape, than to introduce or sanction a practice which might place the innocent entirely in the power of the court or public prosecutor, which the mode of trial by jury was intended to guard against.

The next succeeding case, that of *The People v. Goodwin* (18 Johns., 187), was an indictment for manslaughter. The trial lasted five days. The jury retired to consider of their verdict at 2 o'clock in the morning of the fifth day, and remained until 6 o'clock in the afternoon of the same, when they came into court, and being asked as to their verdict, answered that they found the prisoner guilty, but begged leave to recommend him to the mercy of the court. Before the verdict was recorded, the counsel ~~p~~ ayed that the jury might be polled, which having been done, the third juror answered not guilty. They were then sent out to reconsider their verdict. At half past eleven P. M., and within a half hour of the legal termination of the session, the court sent to know whether they had agreed, and being answered in the negative, they were sent for and returned into court. On being asked by the presiding judge whether they would be able to agree within half an hour, being the latest period to which the court could sit according to law, the jurors answered that "There was not the least probability of their agreeing". They were thereupon discharged by the court. "Upon full consideration", the court were

of the opinion, "that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme necessity, and that it may be exercised without operating as an acquittal of the defendant, as well in felonies as in misdemeanors. It exists and may be discreetly exercised in cases where the jury, from the length of time they have been considering a cause, and their inability to agree, may be fairly presumed as never likely to agree, - unless pressed to do so from the pressing calls of famine or bodily exhaustion. But this would be forcing them to agree, and a forced verdict is unlawful and may be set aside. See Green v. Telfair (11 How. Pr., 260); Huntoon v. Russell (50 How. Pr. 154); Erwin v. Hamilton (50 How. Pr. 32).

Thus it seems that the rule is that the right to exercise the power exists only in cases of extreme and absolute necessity. What shall satisfy it must of course depend upon the judgment of the incumbent of the Bench. And the judgment of the court in this case was that the termination of the powers of the court constitutes that "extreme and absolute necessity" which justifies the discharge of the jury.

The People v. Green (13 Wend. 55) was also a case decided in the New York Supreme Court. It was an indictment for grand larceny, and serves well to illustrate how far such a principle will be carried when once it gets a start. The prisoner was indicted, arraigned and tried on the same day. The jury retired, and after being absent half an hour, returned into court and stated that they had not agreed. The counsel for the prisoner on being asked to consent to their discharge, refused to do so; whereupon the court discharged the jury. Two days afterward, the same grand jury which had found the indictment under which he was tried, found another against him for the same offence, on which he was again arraigned. In the Supreme Court the judgment was affirmed. The court said that, "It was very unusual to discharge upon only a half an hour's consultation of the jury. Possibly, after longer discussion there might have been an unanimity of opinion" - - - - - "Juries should not be discharged because, upon the first comparing of opinions, there happens to be a disagreement. Temperate discussion may produce unanimity, and time should be allowed for that purpose; but where such time has been allowed, and the

court become satisfied that there is no reasonable prospect of an agreement by further discussion, it then becomes their duty to discharge. - - - -"On that point the court below, who may have known the character of the jury, may have come satisfactorily to the belief that they never would agree, and that longer confinement would be unavailing." - - - - "It is true" continued the court, "that in all cases which have arisen in this court, the jury has not been discharged until a much longer time had been spent in efforts to agree than in this case; but, where it is admitted that the court has power to discharge, and that the time when the power ought to be exercised rests in the discretion of the court, a case is presented in which it seems, that if the power has not been discreetly exercised, there can be no remedy by writ of error". This last, it seems to me, is an example of legal logic which surely leads to a harsh conclusion.

We may consider these cases sufficient to show the doctrine as established in the State of New York. Some of the other states, especially Massachusetts, New Jersey, and the Supreme Court of the United States, have followed the same doctrine. A few of the states, notably North

Carolina, Pennsylvania and Virginia, in their earlier decisions at least, held an apparently opposite view, but they are tending gradually in the direction of the other states, all favoring a relaxation of the strict rule attempted to be laid down in some of the early common law cases. To make an exhaustive survey of all the cases in the several states would lead me beyond the purpose and limits of this article. Such a task, though perhaps valuable, would add no new arguments to the question either pro or con, but would simply be an enumeration of results.

Addison Burton Reed.

